

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

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|--|----------------------------|--|
| <b>CAROLINA CASUALTY INSURANCE<br/>COMPANY</b> | §<br>§<br>§<br>§<br>§<br>§ | <b>CIVIL ACTION NO.<br/>3:09-CV-02377D</b> |
| <b>V.</b>                                      |                            |  |
| <b>TUTLE &amp; TUTLE TRUCKING, INC.,</b>       |                            |  |

**DEFENDANT TUTLE & TUTLE TRUCKING, INC.'S RULE 12(b)(6) MOTION TO  
DISMISS THE COMPLAINT OF CAROLINA CASUALTY INSURANCE COMPANY**

**TO THE HONORABLE JUDGE OF SAID COURT:**

COMES NOW, TUTLE AND TUTLE TRUCKING, INC., (“Tutle”), Defendant in the above entitled and numbered cause, and files this, its Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and Local Rule 7.1, and in support thereof would respectfully show this Honorable Court as follows:

**I.**

**INTRODUCTION AND SUMMARY**

1. Carolina Casualty Insurance Company (“Carolina”) filed a Complaint against Tutle on or about December 14, 2009. The Complaint as alleged in Complaint assert that Plaintiff Carolina has no duty to defend and/or indemnify Tutle for any alleged claims or damages asserted by Mr. Archie Henderson against Tutle in a pending state court action before the 249<sup>th</sup> District Court of Johnson County, Texas.

2. However, Plaintiff fails to ever reference in its Complaint that to date Tutle has never tendered the petition of the *Henderson* matter seeking defense or indemnity from Carolina. Thus, Carolina is seeking to prospectively have this Court bless a denial of a claim that has yet to be tendered and may never be tendered

3. Based upon the current state of the underlying pleadings in the Henderson matter, Tutle has elected to not tender any claim for defense and/or indemnity to Carolina. Thus, at this time Tutle contends that no justiciable controversy exists between Carolina and Tutle as Carolina is seeking to resolve an insurance dispute that does not exist and likely never will.

4. However, Tutle refuses to simply allow Carolina to take a judgment against it as the status of the underlying pleadings may yet change and possibly bring Carolina's policy into issue. Obviously, in such event Tutle desires to retain the right to exercise its contractual rights as a policyholder to seek a defense and/or indemnity from Carolina. The mere fact that such an event has not arisen to date, does not mean it will not. Nor does it give Carolina the right to prospectively trump Tutle's rights under the policy before Tutle has ever elected to rely upon them. As no claim has ever been asserted against Carolina, no justiciable controversy exists to grant Carolina standing to try and avoid some potential eventual policy obligation.

## **II.**

### **ACCOMPANYING BRIEF**

Pursuant to Local Rule 7.1, the issues discussed in the above-referenced Motion to Dismiss and supporting authority will be discussed in greater detail in Defendant Tutle's Brief in Support of this Motion to Dismiss.

WHEREFORE, PREMISES CONSIDERED, Tutle & Tutle Trucking, Inc. respectfully requests that the Court dismiss all claims against it by Carolina Casualty Insurance Company because Carolina fails to state a claim for which relief can be granted and that the Court grant Tutle such other and further relief to which it may be entitled.

Respectfully submitted,

**COOPER & SCULLY, P.C.**

By: /s/ Wesley G. Johnson  
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**ATTORNEYS FOR DEFENDANT  
TUTLE AND TUTLE TRUCKING, INC.**

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing document was forwarded to counsel herein via ECFI and U.S. Mail or Certified Mail, return receipt requested, on this the 17<sup>th</sup> of February 2010, as follows:

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